

## The Merge of Antitrust Enforcement Agencies in China and Its Implications

Stephanie Wu, Song Ying | March 29, 2018

On March 13, 2018, Li Keqiang, Premier of the State Council of the People's Republic of China submitted a proposal to the People's Congress in session to review and consider the "Institutional Reform Program of the State Council" ("**Program**"), shedding light on plans to consolidate the antitrust enforcement powers under three agencies (the National Development and Reform Commission, the State Administration for Industry and Commerce, and the Ministry of Commerce) into one agency under the State Administration for Market Supervision ("**SAMS**").<sup>1</sup> Without suspension, the Program was passed by the People's Congress and was announced officially on March 24, 2018.

The merge, taking place on the tenth anniversary of the implementation of the China's Anti-Monopoly Law ("**AML**"), will likely bring changes to China's antitrust enforcement landscape. Here we look at some of the reasons for this change and the possible implications the Program will have on antitrust enforcement in China.

---

1

[http://www.legaldaily.com.cn/zt/content/2018-03/18/content\\_7499072.htm?node=91275&from=singlemessage](http://www.legaldaily.com.cn/zt/content/2018-03/18/content_7499072.htm?node=91275&from=singlemessage), accessed March 24, 2018

## **Background**

The merge came against the bigger picture of the 8th institutional reform in the People's Republic of China, one of the highlights of which is the building of a unified market supervision authority, SAMS, which was reportedly established on March 21, 2018.<sup>2</sup> In an interview with Wang Yukai, an expert on China's administrative system reform research, he stated that the reason for this institutional reform was to reach the objective of releasing the administration from the management of specific issues, in the sense that what should be left for the market to solve will be left for the market to solve.<sup>3</sup>

According to the Program, China will establish five comprehensive enforcement task forces, consolidating regulatory powers which were more dispersed previously. The five task forces will oversee the comprehensive enforcement in the aspects of market supervision, ecology and environment protection, culture markets, transportation, and agriculture. Among these task forces, the market supervision task force, SAMS, draws much attention as it will combine the original responsibilities of the administration of industry and commerce, quality inspection, food and drugs, commodity price, trademark, patent, etc., which have an across-the-board impact on businesses.

## **Sentiments behind the merge**

The move came after much anticipation and arguments that China should have its own single antitrust agency instead of the current three-agency model. Since the inception of the implementation of the AML in 2008, the National Development and Reform Commission ("**NDRC**") and its authorized local subsidiaries has had within their ambit the enforcement power against price-related AML violations, the State Administration for Industry and Commerce ("**SAIC**") and its authorized local subsidiaries has had enforcement power against non-price

---

<sup>2</sup> <http://news.sina.com.cn/c/2018-03-23/doc-ifyspfzq6758658.shtml>, accessed March 24,

2018

<sup>3</sup> [http://finance.ifeng.com/a/20180313/16025880\\_0.shtml](http://finance.ifeng.com/a/20180313/16025880_0.shtml), accessed March 24, 2018.

---

related AML violations, and the Ministry of Commerce (“**MOFCOM**”) has been overseeing concentration of undertakings (or merger reviews).

In the beginning of China’s antitrust enforcement history, this three-agency model was claimed by the authorities as would not create conflicts or overlaps among the three in enforcement work. For instance, in an interview with Shang Ming, the then director of the Anti-Monopoly Bureau of MOFCOM, he argued that the division of enforcement power among the three agencies were clearly specified and there would not have the issue of overlapping. However, he also remarked that it is possible that some issues of commonness [in the enforcement work] will emerge, and that coordination and cooperation [among the three agencies] will be required.<sup>4</sup>

Despite the argument, however, there has long been sentiments among practitioners and scholars alike to have a single unified antitrust agency in China. The sentiments might reflect the observation that some other major antitrust jurisdictions in the world has adopted the unified competition enforcement agency model, such as the EU, Japan, Hong Kong, and South Korea. The fact that the three-agency model has presented incoherency when it comes to procedural and substantive matters might also have contributed to the sentiments. For instance, the NDRC and SAIC have not been coherent in applying measures of sanctions - the NDRC rarely applied the “confiscation of illicit gains” alongside fines to infringements, whilst the SAIC applied it in many of its infringement decisions. Concerns have also been expressed toward the unclear delineation between price-related or non-price related violations.

### **What is the timing and will there be a transition period?**

There has been no official announcement as to what the timing may be for the implementation of the merge. What is expected is that the Program will be implemented at different phases - first at the levels of the central and provincial governments, and after that the Program will be fully introduced in the prefectures, counties, towns and villages. Considering that the AML enforcement power has always been vested mainly with the state and provincial-level (by

---

<sup>4</sup> [http://www.gov.cn/zxft/ft155/content\\_1168858.htm](http://www.gov.cn/zxft/ft155/content_1168858.htm), accessed March 24, 2018.

authorization from the former) government agencies, the phased implementation may have less implications on the reform of the AML enforcement agencies, which is to say, the implementation the reform in terms of the AML enforcement will be seen in phase one.

Likewise, nothing has yet been said officially about the transition period for the reform.

### **Appointment of personnel**

The appointment of director-general has been announced on March 23, 2018. Zhang Mao, 64, who is the original director-general of SAIC will be the director-general of the new SAMS. Reportedly, the staff of the new AML agency under SAMS will combine staff of the original three agencies. Who will head the AML agency under SAMS has not announced as of this date.

### **What can be expected?**

The merge will likely improve the stability of the AML enforcement agency and foster certainty and consistency of AML-related practices and rules in China. As such, businesses will be afforded with an improved level of certainty, as to how to work out their compliance efforts.

Under the newly unified agency model, the previous struggle and confusion of whether a specific conduct, such as loyalty rebates, would fall in the category of price violation or non-price violation will become non-existent. This will expedite the handling of and responses to AML-related complaints on the part of the regulator.

In the long run, the unnecessary inconsistency among different sets of rules issued by three parallel agencies on one issue might also disappear. What is unclear at this stage is the effectiveness of the regulations and soft laws published or in contemplation by each of the three agencies or by joint efforts of the three agencies. In this aspect, one of the key questions is how to harmonize the inconsistency among the rules and practices relating to the application of leniency, sanctions, as well as the “safe harbour” which has been contemplated in the draft guidelines to be applicable to the motor vehicle industry and intellectual property rights.

**Summary**

As mentioned above, although the merge is significant in terms of institutional reorganization and the improvements it may bring to practices and consistency, the merge is not something that will change the AML enforcement activities in China fundamentally. That said, there will be several issues which are worthy of close observation and these may include: (i) the way in which AML enforcement activities will be carried out procedurally by the new agency; (ii) the way in which the existing regulations and soft laws will be applied in cases after the merge; (iii) the enforcement priorities of the new agency; (iv) the head of the new agency, and not least (v) the style to be formed of the new agency.

**Chart: The Structural Reform of Anti-Monopoly Enforcement Agencies in 2018**

